No. 12502

United States
Court of Appeals
For the Ninth Circuit.

W. E. BUELL, Trustee for the Bond Holding Creditors of the Montague Water Conservation District,

Appellant.

vs.

MONTAGUE WATER CONSERVATION DISTRICT, Bankrupt, and THE CITY OF MONTAGUE,

Appellees.

Appellant's Opening Brief

APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA,
NORTHERN DIVISION.

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I

STATEMENT OF FACTS

In the year 1943, the bankrupt Montague Water Conservation District and its bondholders entered into a composition agreement which was approved by the District Court (See Transcript page 3). Certain properties owned by Appellee City of Montague were expressly excluded from the composition agreement. Levies were made upon these excluded properties by the District to pay outstanding bonds (See Transcript page 4). The City of Montague brought an action for equitable relief in the bankruptcy court (See Transcript pages 2-7). W. E. Buell, the Trustee heretofore appointed by the Court, appeared and moved to strike the petition upon the ground that the Court had no jurisdiction (See Transcript page 8), and answered the petition admitting all of the allegations except the allegation that no notice was given appellee of the original action, and in addition thereto set up the defense of laches.

The bankrupt made merely a nominal appearance and, except for the affirmative defense, raised the same issues as did the Trustee. The real property described lies outside of the city limits of the City of Montague.

II

STATEMENT OF APPELLANT'S POSITION AND SPECIFICATION OF ERRORS

Appellant's position is two-fold. FIRST, that the Court had no jurisdiction to hear the petition; and SECOND, assuming, but not admitting, that the Court did have jurisdiction, that the City of Montague is not a proper party for the reason that in this instance it was a creditor not included within the composition agree-

ment and therefore any agreement within the composition was of no interest to it.

III

ARGUMENT

A. The District Court had no jurisdiction to enjoin the levy of a tax. This matter was quite definitely decided by Judge Healy, Judges Garrecht and Haney concurring, in the case of *Mason vs. Merced Irrigation District,* 126 Fed. 2d. 920.

In the cited case this Court refused to reverse on appeal upon the ground that the order complained of did not limit the taxing power of the municipal subdivision, but in the opinion the Court inferred that had they found that the order did not interefere with the political or governmental powers, it would have reversed the order. In connection therewith it might be noted that the states are reluctant to even grant to their own courts the power to enjoin their levy. See *Crocker vs. Scott,* 149 Cal. 575; 87 P. 102.

A further issue not entirely in point but generally pertinent is the fact that the courts do not seem to recognize any implied equity power or authority of a Court setting in Bankruptcy. At least this is the impression that the writer gets from reading what cases are available to him cited in 8 Corpus Juris Secundum, and a good example of this line of cases is *In Re Kligerman* (D. C. Pa) 253 Fed. 778, in which the Referee in Bankruptcy recommended that the Court order a deed cancelled from the records of the Recorder of Deeds of a Pennsylvania County. The Court refused upon the ground that it had no jurisdiction as it has not even the slightest vestige of equitable powers. Following the

reading of the Kligerman case, it would be difficult to comprehend how a District Court court cancel an assessment on a piece of property that is admittedly not even a part of the composition agreement when it is apparently the rule that the Court could not expunge a deed given fraudulently in a transaction which was an integral part of the bankruptcy proceeding.

B. The City of Montague is not a proper party.

It is well settled that any person or class of persons not included in a bankruptcy or a composition agreement are not bound by the composition proceeding. The property was admittedly omitted from the composition agreement (See Transcript page 14, 31), this property being left entirely out of the agreement is not a part of the petition. See *Rittenoure vs. City of Edinburg,* 159 Fed. 2d 989. The property was certainly a proper subject of taxation. See *San Francisco vs. San Mateo,* 17 Cal. 2d 814, 112 P. 2d, 595. Art. XIII, Sec. 1, California Constitution.

In addition, the Appellee's position is fatally defective in that it has failed to allege or prove that it had paid or offered to pay any taxes due, and this of course is a prerequisite to bringing an action to set aside an assessment. See *Imperial Land Company vs. Imperial Irrigation District* 173 Cal. 660; 161 Pac. 113.

The Appellee is apparently making no contention that the District did not have power to levy these taxes but for the record they authorized so to do. See Section 25535 of the Water Code of the State of California.

At the very best, the Appellee, if it were a beneficiary at all, and it is submitted that Appellee failed to show

where they came into the composition agreement or were benefitted by it, the Appellee would be no more than a mere incidental beneficiary and therefore would have no standing in court to enforce the terms of the composition agreement. See *Mottashed vs. Central & Pacific Improvement Corp.* 47 P 2d 525.

IV

CONCLUSION

It is clear that the Court had no jurisdiction, and even if it did have jurisdiction, Appellee was not a proper party.

Dated: Yreka, California, January 10, 1951.

Respectfully submitted,

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